87-708

Supreme Court, U.S.
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CLERK

SUPREME COURT NUMBER_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1987 TERM

RUFUS JOHNSON,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE PETITIONER DENIED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL IN DEROGATION OF THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE SIXTH AND FOURTEENTH AMENDEMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL JUDGE, IN THE PRESENCE OF THE JURY, ASSUMED AN ADVERSARY ROLE BY ARGUING WITH DEFENSE COUNSEL ABOUT THE RELEVANCY OF THE DATE ON WHICH A BALLISTICS REPORT WAS PREPARED?

II. WAS THE EVIDENCE IN SUPPORT OF PETITIONER'S CONVICTION SO INSUFFICIENT AS TO DENY HIM DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDEMENT?

LIST OF PARTIES

The parties to this proceeding are Rufus Johnson and the State of Alabama.

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CONSTITUTIONAL PROVISIONS AND STATUTES

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OPINIONS DELIVERED IN COURTS BELOW

The Alabama Court of Criminal Appeals affirmed Petitioner's manslaughter conviction without a written opinion. The Alabama Supreme Court quashed certiorari as improvidently granted. See Appendix.

GROUNDS UPON WHICH SUPREME COURT JURISDICTION IS INVOKED

The statutory provision which confers upon the Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. §1257(3), which provides that judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari, where any title, right, privilege or immunity is

specially set up or claimed under

the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION
AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CODE OF ALABAMA, 1975, §13A-6-3

(a) A person commits the crime of manslaughter if:

(1) He recklessly causes the

death of another person, or

(2) He causes the death of another person under circumstances that would constitute murder under section 13A-6-2; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself.

(b) Manslaughter is a Class C felony. (Acts 1977, No. 607, p. 812, §2010.)

STATEMENT OF THE CASE

The Petitioner was indicted by the Grand Jury of Mobile County, Alabama for Murder in violation of Code of Alabama, 1975, §13A-6-2, in which it was alleged that he intentionally killed Carolyn Johnson by shooting her with a gun. (T. 1) After trial by jury he was convicted of the lesser included offense of Manslaughter in violation of §13A-6-3 Code of Alabama, 1975 and sentenced to ten (10) years in the State penitentiary. (T. 12, RRR. 9). The Alabama Court of Criminal Appeals affirmed his conviction without written opinion, and the Alabama Supreme Court, after having granted certiorari, quashed the writ as improvidently granted. [See Appendix].

The State's case-in-chief consisted

of the testimony of twelve (12) witnesses, none of who were eye-witnesses to the alleged crime. (R. 2). The causeof death was established by the testimony of Dr. Gary Cumberland of the Mobile laboratory of the Department of Forensic Sciences, who testified that Carolyn Johnson suffered death by gunshot wound to the left side of her head, (R. 89), the angle of entry being from left to right, back to front, and slightly upward. (R. 93). No gunshot residue or powder fragments were found on the head of the alleged victim nor on any other parts of her body. (R. 90-93). He performed the autopsy on December 30, 1984, and the alleged victim was wrapped in gauze about the head. (R. 88,99).

Dr. William B. Greiser of the University of South Alabama Medical

Center treated the wound on the evening of the shooting, December 28, 1984, and detected no powder burns. He did not scrub the wound, but wrapped the alleged victim's head in a head bandage. (R. 110-117).

The testimony of Richard Dale Carter established that he tested a weapon recovered from the scene with the same type of bullets purchased from the Confederate Ordinance Gun Shop. (R. 130). His report was admitted into evidence, and established that the bullet which killed the alleged victim was fired from that weapon. (R. 28). He also concluded that the gun was fired from a distance of beyond 3½ feet because of a lack of powder burns on the victim. He also testified that he received the weapon with an expended cartridge that was stovepiped in the weapon, and that

in order to remove the cartridge from the weapon it was necessary to pull the slide back to release and pull it far enough back so that another round would be chambered. (R. 124). He further testified that he performed the tests on the gun prior to January 31, 1985, after which he returned the weapon to the custodian at the State Department of Forensic Sciences. (R. 125, 126). After the tests were performed the gun was returned to the Mobile Police Department on June 25, 1985, where it remained until the day before the trial, when Officer L.L. Whitton picked it up and brought it to Carter. (T. 131). During the testimony of Richard Dale Carter, the defense questioned Carter about his report not containing any mention of the fact that no powder burns were found on the body

of the victim, and further questioned him about making a report in January, 1985, when he just received the gun the day before the trial. (R. 100). The trial judge had an extensive colloquy with counsel in the presence of the jury regarding the point of counsel's cross-examination about no mention of lack of powder burns being in the ballistics report. The trial judge interrupted the cross-examination of Carter without objection to prosecution to inquire into and comment upon the relevancy of counsel's line of cross-examination. (R. 100-105).

MR. MARSAL: Well, his report is dated, let me be certain, January the 31st of 1985. And do you know why he got the gun yesterday and had a report of almost a year ago?

THE COURT: Just a minute. What's

the point of that?

MR. KIMBROUGH: Judge, I'm going to object. He's already answered the question. He said he doesn't know. And if the Court please, I can tell the Court why.

THE COURT: Just a minute.

MR. MARSAL: The point of it is that there's nothing in the report about any powder burns. And that he -- this is dated January.

THE COURT: What's him getting the gun yesterday got to do with your questioning this witness?

MR. MARSAL: When did he perform the test if he got the gun yesterday? and it's dated January of '85. That's my point.

MR. KIMBROUGH: Your Honor, I would object to any further questions.

THE COURT: I don't understand that,

Mr. Marsal.

MR. MARSAL: Well, of course, it's the jury that's going to make the decision.

THE COURT: You did not ask him when he performed those tests.

MR. MARSAL: No. But I asked him when he got the gun.

THE COURT: You did not ask him when he got the gun. You asked Mr. Whitton, Off. Whitton when he got the gun.

MR. MARSAL: When he delivered it to him. And he said yesterday. Now if there's any evidence --

THE COURT: What's that got to do with him running the test?

MR. MARSAL: Well, if he got the gun yesterday, how could he make a conclusion in January of "85?

THE COURT: Well, did you ask him that?

MR. MARSAL: Huh? Yes. I asked him to show me in that report;

THE COURT: Bring him back. I want him back right now. (R. 100-101).

The defense moved for a mistrial on the ground that the Court had become an adversary. The motion was denied. (R. 105).

The Defendant made a statement to Officer James Norville, Mobile Police Department, that he and his wife had an argument, that in the course of the argument she pulled out an automatic pistol, they wrestled over the gun, and as they did so the gun went off. (R. 14). He said the gun was in his wife's hand when it discharged. He was obviously upset. (R. 14).

Detective Kenneth Edwin Watts of the Mobile Police Department testified that he arrived at the scene, observed

a black female lying on the bed with paramedics giving her first aid. (R. 134). He noted the weapon's serial number, and identified various photographs of the ceiling in the living room where onebullet had penetrated, (R. 135), and a photograph of the window in the bedroom where another bullet had penetrated. (R. 142). He identified various other photographs of the scene and indicated that the Defendant made no attempt to hide the gun or any of the spent shells. (R. 148).

The testimony of Rebecca Bastian, a Mobile Police Officer and Public Safety Inspector, established that a call from the Defendant was received by another operator, and she returned the call. The Defendant told her that someone had been shot, and that he had done the shooting, and that paramedics

were needed. (R. 16, 17). The Defendant was crying and upset.

The substance of the testimony of David Parker, the alleged victim's brother, was that the alleged victim was a respiratory therapist at The University of South Alabama; and he used to babysit with her children. (R. 41). The Defendant and his wife had had a prior altercation in April or May of 1984 in which the Defendant had punched her and knocked her to the ground. (R. 49). The Defendant told him that the shooting of his wife was an accident, and that she had provoked him. (R. 58). There was some conversation between Parker and the Defendant about the alleged victim having an affair with an individual named Jean Patterson. The Defendant did not learn anything about this until after his wife's death. (R. 53).

Creola Parker, the alleged victim's stepmother, testified that the Defendant and his wife had been married for 6 years. She talked to the Defendant after the shooting when he was in jail. The Defendant did not deny that he shot her stepdaughter over a domestic dispute. (R. 63). He tried to tell her that the shooting was an accident. (R. 66).

Felicia Jean Patterson, a friend of the alleged victim for some 20 years, testified that the Defendant, about a week after the shooting, told her how the shooting occurred. (R. 71). He came home on the evening of the shooting and wanted to have sex with his wife, and she did not. An argument ensued, his wife hit him in the head with the gun; he took the gun away and hit her back. She went into the bedroom where they tussled, and the gun went off. The shooting was an accident, and the Defendant wished he

were shot instead. (r. 73, 74). Mrs. Johnson had carried the gun sometimes. (R. 76).

Vicki Anderson, a friend of the alleged victim for some 15 years, testified that she talked to the Defendant about a week after the shooting and several other times. He said that the shooting was was an accident, that his wife had the gun first and hit him with it in the head. He took the gun from her and hit her with it, then she hit him. He took the gun from her and pulled the trigger. He had threatened to kill her previously if she had another man. (T. 81, 82).

The defense called the only eyewitness to the alleged crime, Tonya Johnson, the five year-old daughter of the Defendant and his wife. Her testimony was in essence that the gun "went off" and shot her mother. It had gone off before that when her mother hit her

father in the head. (R. 158, 159).

Hurriel Locket was a homosexual, and came that evening to the Defendant's house to cut his hair. He was there before the shooting but did not witness it. (R. 164-166).

Johnson's brother, James E. Johnson, told Johnson two days after the shooting that his wife had had an affair. (R. 169).

The Defendant's sister-in-law, Linda Johnson, also a close friend of the alleged victim, testified that the alleged victim told her about a month before the shooting that the gun was in the glove compartment. (R. 174). She had said that if the Defendant did not stop messing with her, it would be him or her. (R. 174). The Defendant was angry when he found out from his brother two days after the shooting that his

wife had had an affair. (R. 175). The alleged victim had called the police and reported the theft of her gun. (R. 177).

The defense called three character witnesses, Ira Burkes, Robert Clay, and Marcus Kennedy, all of whom testified to the good reputation of the Defendant for truth and veracity and for being peaceable. (R. 177-194).

The Defendant took the stand in his own defense and related the events of the evening of December 28, 1984. The previous day he had taken his wife to her doctor's office for an appointment. (RR. 5). On the evening of the shooting, he left home at about 10:30 P.M., led his cousin out of Hillsdale Heights because he was unfamiliar with the area (RR. 7), went to a bar on Cody Road and drank a few beers until 11:30 P.M.

(RR. 7). He called his barber, Hurriel Locket, from the bar, picked him up and took him to his home. (RR. 8). He arrived home between 11:30 and 12:00, and the barber cut his hair, and they left around 12:00 to take the barber home. (RR. 9).

As soon as he returned from taking the barber home, an argument began between him and his wife. She got the gun and sat in a chair in the living room, room, (RR. 9), after which she cocked the pistol and hit the Defendant in the head, causing the gun to discharge. (RR. 10). They went in to the bedroom and he took the gun away from her, after which a tussle ensued. (RR. 1). They were about two feet apart; the Defendant had the gun; his wife hit the gun, and it discharged, after which she fell back on the bed. (RR. 13).

He never aimed the gun directly at her head and did not pull the trigger. (RR. 15). He tried to revive her, called the police, the ambulance and his mother. (RR. 15). He awaited the arrival of the police and the ambulance. (RR. 20). He had never before been convicted of a serious crime, although he was convicted of assault with a gun on an individual named A.C. Wells, his wife's former lover, in 1980. (RR. 48). He did not serve any time for this conviction. (RR. 53). There was a $25,000 insurance policy on his life taken out on him by his wife while he was at sea, although he did not make a claim against it. (RR. 49). Although the gun was pointed at his wife, he did not aim the gun at his wife's head. (RR. 56).

The defense rested and renewed its

Motion For Judgment of Acquittal, which was made at the close of the State's case. (RR. 61). During closing argument, the defense moved for a mistrial on the ground that the district attorney argued that the jury was the conscience of the community. The motion was denied. (RR. 61).

The Petitioner raised Question I presented in this petition by presenting the following issue in brief to the Alabama Court of Criminal Appeals:

> "II. THE COURT ERRED TO REVERSAL IN ITS COLLOQUY WITH DEFENSE COUNSEL IN THE PRESENCE OF THE JURY CONCERNING THE RELEVANCY OF CERTAIN TESTIMONY REGARDING THE DATE OF THE BALLISTICS REPORT AND THE DATE OF THE TEST PERFORMED ON THE ALLEGED MURDER WEAPON BY IMPERMISSIBLY COMMENTING ON THE EVIDENCE, BY BECOMING AN ADVERSARY RATHER THAN AN IMPARTIAL JUDGE, AND BY LIMITING COUNSEL'S RIGHT TO CONFRONT AND CROSS-EXAMINE A WITNESS, ALL IN

DEROGATION OF THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL."

The issue was presented in identical wording on certiorari to the Alabama Supreme Court. The Sixth and Fourteenth Amendments were asserted as authority in both Courts.

The petitioner raised Question II presented herein by presenting the following issue in brief to the Alabama Court of Criminal Appeals:

"I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT OF GUILTY OF THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER, AND THE STATE FAILED TO PROVED A PRIMA FACIE CASE OF MANSLAUGHTER?"

The identical issue was raised in the Alabama Surpeme Court. The Petitioner preserved this issue in the trial court by moving for judgment of

acquittal at the close of the State's case and at the close of the defense on this ground. (RR. 61).

ARGUMENT

I.

The Federal Constitution guarantees criminal Defendants a meaningful opportunity to present a complete defense, whether this right is rooted directly in the due process clause of the Fourteenth Amendment or in the compulsory process or confrontation clauses of the Sixth Amendment; the opportunity to be heard is an essential element of procedural fairness. Crane v. Kentucky, 476 U.S. _____, 106 S.Ct. _____, 90 L.Ed. 2d 636 (1986). A criminal defendant has the right under the Sixth Amendment to confront the prosecution's witnesses for the purpose of challenging their testimony, as well as to present his own witnesses to establish a defense. Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14 (1967).

In this case the trial judge engaged in an adversary colloquy with defense counsel in the presence of the jury, after interposing sua sponte an objection to the defense attorney's questioning the State's ballistic expert on cross-examination regarding the date the ballistics report was prepared. The trial judge apparently felt that this line of questioning was irrelevant and immaterial to the issues in the case. However, he did not excuse the jury while assuming an adversary stance with regard to the defense. Moreover, his action in restricting the cross-examination of this witness deprived the Defendant of his right under the Sixth Amendment to confront a State's witness. As such, this was a denial of the fundamental fairness to which every criminal Defendant is entitled in a

fair adversary process under the due process clause of the Fourteenth Amendment. Blackburn v. Alabama, 361 U.S. 199 (1960). Chambers v. Mississippi, 410 U.S. 284 (1973).

II.

Thompson v. Louisville, 362 U.S. 199 (1960) established the precedent that a denial of due process of law inheres in a conviction of a crime at the conclusion of a trial at which the prosecution produced no evidence either that a crime had been committed or that the accused committed it. The evidence in this case points inextricably to the conclusion that the Petitioner did not possess the requisite intent necessary to establish the crime of Manslaughter under Code of Alabama, 1975 §13A-6-3. The requisite intent under Alabama law requires that the Defendant act either recklessly, that is, there must be evidence from which the jury could have concluded beyond a reasonable doubt that he consciously disregarded a

known risk to such a degree as to constitute a gross deviation from the standard of conduct that a reasonable person would observe in the situation; §13A-6-3(a)(1) or that he acted intentionally to kill the deceased but due to a sudden heat of passion caused by provocation recognized by law and before a reasonable time for the passion to cool and for reason to assert itself. §13A-6-3(a)(2).

Conviction under §13A-6-3(a)(1) was a violation of due process in this case because the evidence is uncontraverted that the death of the deceased was accidental or, at worst, due to criminal negligence. Conviction under §13A-6-3(a)(1) is also a violation of due process because no evidence was introduced by the State tending to show that the Defendant acted intentionally.

The record conclusively establishes that the death of the deceased was due to to accidental or negligent means.

A state conviction of crime totally devoid of evidentiary support is unconstitutional when tested by the due process clause of the Fourteenth Amendment. Vachon v. New Hampshire, 414 U.S. 478 (1974). Adderly v. Florida, 385 U.S. 39 (1966).

This Petitioner's conviction lacks any proof of the crucial elements of recklessness and/or criminal intent. Thus, it violates due process.

CHRISTOPHER KNIGHT
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Christopher Knight, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari on the Honorable Don Siegelman, Attorney General of Alabama, by depositing same in the United States mail, properly addressed and first class postage prepaid on this the 27th day of October, 1987.

Christopher Knight

CHRISTOPHER KNIGHT

APPENDIX

OFFICE OF THE CLERK OF THE

SUPREME COURT OF ALABAMA

RE: 85-1416

EX PARTE: RUFUS JOHNSON

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

RE: RUFUS JOHNSON VS. STATE

Appellant Appellee

You are hereby notified that the following action was taken in the above cause by the Supreme Court today:

XXXX Writ Quashed as Improvidently Granted. No Opinion.

ADAMS, J. - TORBERT, CJ., JONES, SHORES AND STEAGALL, JJ., CONCUR.

original signed
Robert G. Esdale, Clerk
Supreme Court of Alabama

8/28/87
bsa

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

1st Div. 234 Mobile Circuit Court
CC 85-149

RUFUS JOHNSON,

Appellant,

vs.

STATE OF ALABAMA,

Appellee

Dear Sir:

You are hereby notified that on June 24, 1986 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

XXXX Appeal affirmed. No opinion.

Judgment not final, see Rule 41, A.R.A.P.

original signed
Mollie Jordan
Clerk
Court of Criminal
Appeals of Alabama